

Overview of the Attorney’s Role

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Scope Note

This chapter addresses the role of the attorney in residential real estate transactions. It discusses the attorney's initial interactions with the client and procedures to be used in managing the representation. It also reviews a number of specific issues likely to arise in practice, such as the handling of mortgage financing contingencies and title insurance, and examines the roles played by brokers and other professionals. Checklists include outlines for initial letters to clients and detailed checklists for buyers and sellers.

§ 1.1 INITIAL CLIENT CONTACT

In your first contact with a client or a potential client, be it over the telephone or in person, be sure to identify and clearly explain your full range of services and charges. Most clients involved in a purchase or sale of a residential home have limited experience with such transactions. For many, it may be their first encounter with a purchase of real estate. Others may have purchased their home decades earlier and are now faced with a sale of their home and downsizing to a more accessible home for their needs. Still others may be involved with a transfer from the area because of employment.

Consequently, the client needs to understand the process and how you will undertake the representation. Clients, like all purchasers of services, may have a limited understanding of what is involved with the purchase or sale of a residence. It is the attorney's role to explain the process and outline the steps involved for the benefit of the client's understanding. (See Mass. R. Prof. C. 1.4 comment [5] which states in part, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.") Be prepared to discuss fees with the client during your initial conversation.

Practice Note

In your first encounter with a potential client, it is fair to assume that the client may have consulted other attorneys before contacting you in order to compare fees and services. This is the initial point where you will have the opportunity to distinguish yourself by your explanation of the process and your expertise. Thus, it is important that your explanation of the process serves also to justify your fee and how it is calculated.

It is important that you carefully comply with Mass. R. Prof. C. 1.5(b)(1) which states in part, “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation.” During this first contact it is important to explain how your services differ from what other attorneys provide. Absent such an explanation, the client may choose an attorney solely based on cost.

Practice Note

Once you have been retained, prepare an engagement letter that not only outlines your fee schedule but also clearly defines the range of your services. (The Real Estate Bar Association for Massachusetts (REBA) provides written fee agreements for representing a seller or buyer.) Since many clients are not aware of what is *excluded* from your range of services, it is good practice to outline services for which an additional fee might be required (e.g., a zoning opinion or protracted negotiations over inspection results). See § 1.1.3 and § 1.1.4, below.

§ 1.1.1 The Seller Client

If a seller client comes to you before signing a listing agreement with a broker, it is imperative that you review the agreement and make any necessary changes before it is executed. Many listing agreements contain provisions that require the payment of a commission if a buyer is found “ready, willing, and able,” even if the sale is not consummated. In the event of a default by the buyer, the listing agreement may provide for the division of the retained deposit on a fifty-fifty basis between the seller and the broker. Other areas of concern might be the length of the exclusive listing and the length of the additional time for which a commission is owed when a sale is made privately to a prospect that the broker previously brought to the home. See also § 1.2.1, Agreements with Brokers, below. Negotiating a listing agreement should be contemplated in your engagement letter.

If a seller client retains you after he or she has executed an exclusive listing agreement, you can offset the terms of the listing agreement by inserting changes in the purchase and sale agreement, primarily in the clause dealing with the payment of a commission (Paragraph 18 of the Greater Boston Real Estate Board standard form purchase and sale agreement (GBREB agreement)). In such a case, a change restricting the payment of a commission unless and until a sale has been completed will be required to protect the client. However, this change will not be effective against the broker unless the broker becomes a party to the agreement. For this as well as other reasons, many brokers refuse to sign purchase and sale agreements.

Practice Note

You should advise your client about the consequences of a broker's refusal to execute the purchase and sale agreement, pointing out the possibility that, based on the terminology of the listing agreement, a broker's commission will be due even though a sale is not consummated. Additionally,

the broker's failure to execute the agreement may throw into contention several clauses in the standard GBREB agreement dealing with the deposit escrow.

Practice Note

Where the broker refuses to sign a purchase and sale agreement (you should not be surprised if this happens), prepare a letter to be signed by the broker indicating that the broker will abide by the terms of his or her escrow obligations. Alternatively, preparing the signature line restricting the broker's liability and responsibility under the agreement to those clauses dealing with the payment of commission and the escrow responsibilities of the broker may be sufficient for a broker to execute the agreement.

More and more sellers seek to sell their homes without the services of a broker. In such cases, the client may look to you for strategic and practical advice on how to conduct an open house, prepare an offer, accept a deposit, and negotiate any inspection issues. Be prepared to be "all things" to the seller client who chooses not to retain a broker. See **Checklist 1.1** for a purchase and sale checklist to use when representing a seller of a residence or a residential condominium unit. You may consider excluding from your representation the proffering of any advice regarding the valuation of the property.

§ 1.1.2 The Buyer Client

An attorney who is consulted by a buyer client before an offer has been executed will have the opportunity to review the offer with the client. The attorney should pay close attention to details that are important to the buyer, such as the following:

- the date by which the offer must be accepted,
- the date by which a purchase and sale agreement is to be signed by the parties,
- the date for the completion of inspections,
- the date the buyer is required to apply for mortgage financing,
- the expiration date of the financing contingency, and
- the date for closing the transaction.

In many cases, the broker may have selected unrealistic dates for these milestones. It is your responsibility to determine whether your client can accept the dates as is, or whether they must be modified through negotiation with the listing broker or the seller's attorney. Consultation with the buyer's mortgage lender and home inspector may be necessary to determine the feasibility of satisfying the contingency timelines. Often, counsel for the seller will agree that the dates require modification and that they should be amended to reflect market conditions. For example, if the mortgage contingency date will expire in fifteen days but most lenders require at least thirty days to process a loan application, an adjustment is required to avoid unnecessary notices and later negotiations to revise the date.

In many instances, only a few days are provided for the completion of the buyer's home inspection. Consider the availability of a home inspector, the need for additional time to review the inspector's report, the need to await the results of tests that may not be available until the inspection period has passed, or additional time that might be required to negotiate the disposition of deficiencies uncovered by the inspection. For example, an inspection for the presence of radon requires collection canisters to be placed in strategic locations in the home and collected after forty-eight hours for submission to a laboratory for analysis. It may be days after the inspection contingency has expired before the results are available. Unless there is an accommodation for such a situation in the inspection contingency clause, the buyer may be prevented from asserting a deficiency on account of high levels of radon gas found in the laboratory analysis.

Practice Note

Carefully review the additional clauses inserted by the broker or the seller's attorney. In many cases these clauses favor the seller. For example, many inspection clauses restrict the buyer's flexibility in negotiating for repair or credit for deficiencies by imposing a dollar amount as a floor before the buyer may exercise a right. Another common inspection clause indicates that the inspection must reveal *serious structural or mechanical* problems in order for the buyer to avail himself or herself of the benefits of the clause. Consequently, a collection of deficiencies that might require an expenditure of a large sum of money for their correction may not rise to the level of a "serious structural or mechanical problem."

Often, the buyer is given little opportunity to seek legal advice before presenting an offer to the seller. The state of the current local real estate market, especially in the Greater Boston area, is such that sellers have the leverage to insist that buyers either make offers through brokers right away or face possible elimination from the bidding process, thus losing the opportunity to purchase a particular home. Advise your client that the legal necessity for professional review of the offer outweighs the emotional needs of acquiring the home.

Practice Note

Waivers of home inspections and mortgage contingencies in offers is a recent phenomenon brought about by the "hot" real estate market in many parts of Massachusetts. Many buyers elect to waive home inspections, mortgage contingencies, or both in order to make their offer more appealing to sellers. A buyer may consider these waivers as necessary in order to have an offer accepted but may not realize the level of risk being taken. It is up to you to advise the client of all the possible risks, such as loss of a deposit or ending up with the "home from hell."

Document all advice given to your client by notes to the file and by letters or emails to the client to minimize the possibility of a claim against the attorney for failure to properly advise the client. Doing so will provide you with appropriate back-up of your advice or your actions in the event that the buyer claims, "You didn't tell me about [the issue or problem]. You didn't protect me!"

In situations where the buyer client has already executed an offer and the offer has been accepted, the attorney still has the option for negotiating more-favorable terms with the seller's attorney—at least initially. However, the seller's attorney has the negotiating upper hand, on the basis that the offer was accepted embodying the terms in the agreement. Nevertheless, it is incumbent upon the attorney to make clear to the buyer client the various implications of the accepted offer and to attempt to negotiate more-favorable terms in the purchase and sale agreement.

See **Checklists 1.2** and **1.3** for checklists for buyers of residences and residential condominiums.

§ 1.1.3 Attorney Fees

It is important to discuss your fee schedule with the client at the outset of any client engagement. Such discussion should include not only the method of fee computation (fixed fee, hourly rate, or some other method, such as part fixed fee for certain services and part hourly rate for other services) but also your billing practice and payment expectations. This will help avoid any misunderstanding on the part of the client once payment is due.

Your range of services should also form an important part of this conversation. Be sure to confirm the fee arrangement and the range of services in writing to eliminate any question of which services you were required to perform and what you were to be paid for those services. See Mass. R. Prof. C. 1.5(b) (mandating that such information be communicated in writing, with limited exceptions: “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation . . .”).

Practice Note

Whether you represent buyers or sellers, when discussing fees in your engagement letter, indicate that any balances due will be charged at closing and included on the settlement statement or deducted from the proceeds of the sale.

§ 1.1.4 The Importance of Communication

At the commencement of the engagement, be sure to submit an engagement letter to your client outlining your services and fees. It is also important to inform your client what services you are *not* engaged to do. For example, it is important to inform the buyer client that you are not going to perform a zoning analysis unless specifically requested to do so. Unless you have made it quite clear to the buyer client that zoning issues are beyond the scope of your representation, the postclosing discovery that zoning will restrict the buyer's future plans could lead to a malpractice claim.

When representing a seller, be sure to inform him or her of your range of services. Do not leave matters to speculation or assume that your client knows what is customary in residential transactions. Remember that your client may be unsophisticated

regarding real estate transactions, regardless of how many business transactions your client may have previously completed. Your client will be looking to you for your knowledge and expertise.

When representing a buyer, it is important to determine whether you will also be serving as settlement agent for the closing. If the buyer is pursuing mortgage financing, you may be called on to serve as settlement agent on behalf of the lender, and you should disclose your legal fee accordingly. If private financing is involved, you should account for either the drafting or the review of private financing documents as part of your engagement letter.

If you assume that you will not be searching the title or providing a zoning opinion for your buyer client, spell it out in your written communication with the client. If a problem occurs because an easement was not disclosed to the client or if a zoning violation is uncovered after the closing, your communication will serve as your disclosure of your range of services.

Checklists 1.4 and 1.5 set forth the suggested contents for initial letters to be sent to seller clients and buyer clients, respectively.

One of the criticisms most often leveled against attorneys relates to communication. American Bar Association studies have clearly and consistently pointed out that clients are intimidated by the legal process and by attorneys on the one hand and enraged by attorneys' failure to communicate promptly on the other.

Make sure that your client receives copies of every document coming to your attention as well as all documents and communications leaving your office relating to his or her matter. With the wide usage of email, scanning, and faxing, it is easy to communicate with your client to provide updates or changes in a quick, efficient, and informal manner.

Return all telephone calls promptly, not only to your client, but to all of the parties involved in the transaction. What better way is there to develop a client base through referrals than to demonstrate that you are not only competent and accessible but also "on top of the client's case" at all times?

Practice Note

If you establish communication with the other party's counsel, the brokers, and the lender or the lender's counsel, and keep your client informed of such contacts, you will be able to provide high-quality service to your client. You will also gain a reputation for being accessible and prepared—two key qualities that may result in a sense of professionalism, lead to further referrals, and be an asset to your transactions with other members of the conveyancing community. With email communications becoming the norm, it is very easy to copy your client on all communications relative to the transaction, but remember that emails can be forwarded to other parties as well.

It is important for you and your staff to have a tracking system that allows you to efficiently locate files and review the status of each party's transactions. You should always maintain a calendar of contingency and closing dates so that you are not placing your client at risk for nonperformance of any of the purchase and sale agreement's provisions. All malpractice carriers want to know how each attorney keeps calendared activities, such as the date by which an agreement is to be signed, when the financing contingency date expires, and proposed closing dates.

Prepare and maintain a checklist that will serve as the first page of your file and will tell you or any staff member in your office about the status of the file at any particular time. Create your own standard checklists for a buyer's transaction and a seller's transaction that will allow you to respond to critical dates and inquiries. In addition, use the calendar system on your computer as a reminder to make calls or determine whether specific matters have been accomplished. Such a checklist, kept current through closing and postclosing matters, will serve you well should a matter regarding the transaction arise several months or years after the closing that might require you to retrieve the file and respond to any issues the caller may need resolved.

At a minimum, include the following on the checklist:

- the property's address;
- the brokers' names, email addresses, and telephone numbers;
- the name, address, email address, and telephone and fax numbers of the other party's attorney;
- the name, address, email address, and telephone and fax numbers of the lender's representative, if applicable;
- the name, address, email address, and telephone and fax numbers of the lender's attorney, if applicable;
- the full names of all buyers and sellers;
- how the buyers will hold title, e.g., as tenants by the entirety, joint tenants with rights of survivorship, or tenants in common;
- in cases involving sellers, the names of lenders, addresses, contact telephone numbers, and account numbers for outstanding loans;
- inspection and financing dates;
- results of inspections and how the results were resolved;
- commitment terms;
- time, date, and place of closing;
- whether the client wants you to attend the closing; and

- postclosing matters, such as copies of deeds and other instruments and the recording of discharges of mortgages.

Practice Note

Sellers may not wish to or cannot attend the closing and will ask that you attend in the seller's place. Be sure to have the seller execute the deed as well as provide you with a power of attorney that allows you to execute documents in the seller's name, make minor corrections to the deed, and collect the seller's funds. (See Real Estate Bar Association for Massachusetts (REBA) Form 11.) Bring photocopies of the seller's driver's license and the seller's Social Security number. Since you will be signing documents for the seller that may contain representations of the seller (e.g., whether or not UFFI has been installed; whether 1099s need to be issued; mechanics' lien affidavit) it is incumbent to have the seller indicate how those and other forms typical in a residential transaction should be completed. (See REBA Form 11A.)

§ 1.1.5 Gathering the Information You Will Need

The need for continual attention to the transaction cannot be overemphasized. Maintaining logs and checklists will help you organize each file. See § 1.1.4, above, for typical matters to include on a file checklist. You should also gather the following information:

- whether the client has signed or accepted an offer to purchase (obtain a copy if your client has signed an offer or acceptance);
- by what date the client needs to execute a purchase and sale agreement;
- if the buyer client has applied for financing, the name or names of the lender or lenders and what type of financing the client applied for, e.g., conventional, FHA, VA, or first-time home buyer;
- what type of property the client is purchasing or selling, e.g., multifamily, new construction, or property in need of repairs or rehabilitation;
- what appliances and personal property, if any, are included in the transaction;
- any other special considerations that might apply to the client, such as relocation to or from the area, or the purchase or sale of property from an estate; and
- whether the land in question may have been former railroad property.

If you will be representing more than one client (i.e., more than one buyer or seller), you must establish which client will be your primary contact. Additionally, in any transaction involving multiple clients, you must be continually aware of possible conflicts of interest. You should advise your clients regarding the possibility that a conflict may arise if the objectives of each client differ after the engagement (e.g., one client wants to buy and the other client wants to back out of the agreement). You should also advise your clients that it may not be possible to maintain confidentiality with respect to information received from either client. See *generally* Massachusetts

Bar Association Committee on Professional Ethics Op. No. 90-3 (June 15, 1990) (decided under the Canons of Ethics and Disciplinary Rules in effect through December 31, 1997) (“Unless otherwise agreed, multiple representations waive the confidentiality obligation between the borrower and the lender, and both clients should be so advised. A lawyer who acquires knowledge about either client relevant to the transaction, such as uncertain financial condition or source of funds, misstatements, omissions or errors in the mortgage application or documents to be signed at closing, is required to disclose it to the other client.”).

Conflicts may also arise if you are asked to represent the lender as well as the buyer in a given transaction. Because your client (either the lender or the buyer, or multiple buyers or multiple sellers) may ask you about conflicts of interest, it is important for you to detail (preferably in writing) for each client which services you will be performing for the lender and which services you will be providing to the buyer. Failure to make such disclosures could lead to very uncomfortable situations if information comes to you from the buyer that may affect the lender’s commitment to loan the money for the purchase. For example, you might represent the lender and the buyer. Your client, the buyer, informs you that he or she has been laid off from work but still wants to proceed with the purchase. This information should be communicated to your client, the lender.

§ 1.2 THE ROLE OF THE BROKER

If there is a real estate broker involved in the transaction, he or she will typically “drive the process” by arranging the home inspection and making sure the agreement has been signed. The broker will often transport the agreement to the parties for their signatures to expedite the completion of the contract. Many brokers now use different forms of “e-signing” which allows buyers and sellers the comfort of “executing” the agreement on their computers. If issues arise regarding the condition of the property, as may result after an independent professional property inspection by an expert hired by the buyer, the broker can help to resolve such issues. Although the physical condition of the property is not a legal issue and attorneys typically do not view the property, brokers are very familiar with not only the condition of the property being sold but also the typical aspects of similar properties in the area. They may know what adjustments would be appropriate to satisfy both parties in a sale.

Practice Note

Under Massachusetts law, brokers and salespersons may act as “dual agents,” representing both prospective buyers and prospective sellers. See G.L. c. 112, § 87AAA¾; see also 254 C.M.R. § 3.00(13). The law requires informed written consent, obtained using a form prescribed by the Massachusetts Board of Registration of Real Estate Brokers and Salespersons.

Although a property owner can sell his or her property without the assistance of a professional broker, most sellers employ one. A real estate broker has more resources at his or her disposal to find a larger group of potential buyers than the seller, such as

by employing the multiple listing service (MLS) and databases to assist sellers in establishing a reasonable listing price for their property. Usually, the seller enters into a contract with the broker under which the broker agrees to use reasonable efforts to find a “ready, willing, and able” buyer, and in turn the seller agrees to pay the broker a fee for this service when such a buyer has been presented and the closing takes place. The broker’s fee is usually a set dollar amount or a percentage of the purchase price obtained for the property.

§ 1.2.1 Agreements with Brokers

There are two types of listing agreements that are most often used to establish the conditions under which the broker is entitled to a fee or a commission from the seller. The first and more common listing agreement is an agreement for the exclusive right to sell. Under this type of agreement, the seller cannot reserve the right to sell the property without the assistance of the broker and therefore cannot avoid paying the broker’s fee, even if the buyer is procured solely through the efforts of the seller and has not been introduced to the property by the broker. This type of agreement has a specific duration, and the broker is entitled to a fee if the property is sold through the efforts of anyone—especially the seller—during this period or if the property is sold within a set number of days after the expiration of the period to a buyer who was introduced to the property by the broker. The second type of agreement is an agreement for exclusive agency. Under this type of agreement, the seller reserves the right to sell the property to a buyer who was not introduced to the property by the broker; in that event, the seller does not have to pay a broker’s fee. As a practical matter, the latter form of agreement is rarely used by the broker community.

Both types of agreements set forth the marketing methods that may be used by the broker to sell the property, over and above simply showing the property to potential buyers. For example, most properties are posted on the MLS, which alerts other brokers to the fact that the property has been listed for sale with a particular broker, who is known as the “listing broker.” A broker from any other agency who participates in the transaction by introducing a buyer to a property posted on the MLS is known as the “selling broker.”

The listing broker and the selling broker will enter into an agreement as to what portion of the listing broker’s fee will be paid to the selling broker for his or her efforts in procuring a buyer for the property.

§ 1.2.2 The Selling Broker

The selling broker (or a listing broker who also acts as the selling broker) typically works with the buyer, showing the property as well as often recommending attorneys and mortgage lenders with whom the broker usually works. Each buyer must be given a “mandatory agency disclosure” regarding the agency relationship of the broker to the parties and its implications.

The selling broker can also help the buyer narrow down his or her housing requirements and desires and determine an appropriate price range of properties for the buyer

to view. The selling broker may assist the buyer in submitting his or her offer to the seller, but because the selling broker's duty of loyalty is to the seller (he or she must submit any and all offers to the seller), the selling broker cannot assist the buyer in any way that would be adverse to his or her client's interests.

§ 1.2.3 The Buyer's Broker

The buyer may decide to engage the services of a buyer's broker to represent his or her interests in the transaction, including negotiations with the seller. This buyer's broker may be compensated by either the buyer or the listing broker as a type of "subagent." Because a selling broker and a buyer's broker have different clients to whom they owe the duty of loyalty, each is able to provide different services to a buyer. These services differ from those that the listing broker provides to the seller. For example, the buyer's broker may work more closely with the buyer to determine what type of property and which communities would best satisfy the client's wishes and fit within his or her personal and financial considerations. The buyer's broker also may become more involved in helping the client evaluate properties, formulating an offer to present to the seller through the listing broker and negotiating a final purchase price and other terms to be included in the final contract, such as items that should be included in the sale or repairs that should be made to the property prior to closing.

§ 1.2.4 The Listing Broker

The listing broker is responsible for relaying offers to the seller and explaining any terms or conditions that may be included in them. Brokers who are agents of the seller are obligated to communicate each offer on the property to the seller.

Practice Note

The broker is subject to all fair housing and nondiscrimination laws and cannot discriminate either in showing the property to potential buyers or in transmitting offers to the seller.

The listing broker provides various other services to the seller, which may include the following:

- helping the seller establish market value and a reasonable asking price for the property;
- discussing exclusions from the sale to be included in the MLS listing;
- explaining aspects of the selling process to the seller (such as showing the property, advertising, featuring attractive aspects of the property, and considering whether to conduct an open house);
- placing the property on the MLS (as is required of the listing broker) and handling inquiries about the property from other brokers;
- obtaining copies of the Title 5 inspection for the buyer;

- providing copies of condominium documents, including but not limited to, the master deed, the declaration of trust, budgets, financial statements, and association minutes;
- assisting the seller in negotiating the terms of the offer with the buyer;
- helping to “prequalify” a potential buyer by evaluating the buyer’s ability to obtain the financing necessary to purchase the property;
- holding the initial, binding deposit after acceptance of an offer;
- acting (in many cases) as the escrow agent holding the deposit after the signing of a purchase and sale agreement; and
- ensuring that the appropriate lead paint disclosures are signed by the potential buyer.

In certain communities, it is customary for the listing broker to prepare the first draft of the purchase and sale agreement and then submit it to the parties for review and negotiation by their respective attorneys. Whether it is this preliminary draft or an offer to purchase that is submitted to the attorneys, the brokers will follow up, as stated above, to be sure that a final agreement is signed on or before the date specified in the offer.

Practice Note

If possible, it is good practice for the attorney representing a seller to prepare the first draft of the purchase and sale agreement. When reaching out to the listing broker, make it clear that you wish to prepare the first draft of the purchase and sale agreement. The broker’s draft agreement merely fills in blank spaces and it is more difficult to prepare your provisions interspersed with the broker’s draft. Notify the broker that you will prepare the draft once the offer is accepted. It is important to note that the agreement should be submitted in draft form to the client for his, her, or their review, together with commentary so that the client has an understanding of the “legal mumbo-jumbo” in the agreement. Devise a letter which explains key provisions to the client and invite the client to discuss provisions the client does not understand.

There are other services that the listing broker customarily provides for the seller after the agreement is signed. The broker typically arranges a date for the local fire department to inspect the property for compliance with smoke and carbon monoxide detector requirements and to issue a certificate of compliance. The broker may also provide access to the bank’s appraiser for a view of the property and, if necessary, to the buyer for a walk-through inspection prior to the final preclosing. The broker may also arrange final utility readings prior to the closing, including water and sewer charges, fuel oil readings, and electricity or gas usage, in cases where these utilities are provided by the city or town.

Practice Note

The listing broker should also be enlisted to obtain final readings for fuel oil (if the home is heated by oil) and final water and sewer charges. Encourage the client to contact the listing broker for the purpose of obtaining final readings of all utilities that are not adjusted at the closing (usually, telephone, cable, electric, and gas) and contacting each utility to provide the necessary information as well as the name(s) of the buyer(s) for future billing purposes.

Practice Note

Keep in mind that the certificate issued by the fire department for smoke and carbon monoxide detectors are only "good" for sixty days. Log the end date in case the closing date has to be extended. A new certificate may be required if it is outdated which may further delay the closing if a new certificate must be obtained.

Practice Note

If the property being sold is a condominium unit, the listing broker should also attend to obtaining a 6(d) certificate and the certificate of insurance required by the buyer's lender.

§ 1.3 SELLING WITHOUT THE SERVICES OF A BROKER

In today's economy, many sellers seek to maximize their net return by attempting to sell their property themselves, without the assistance of a broker. As stated above, the seller may look to you to provide some of the assistance the broker would ordinarily provide. You should exercise care in just how much practical or strategic advice you give, if any. Certainly, you can provide your client with a prepared blank offer and instructions on how to complete it if you are not available. The selling client should be advised to maintain a written record of the people who have attended open houses or have visited the house. You should also advise the client on the handling of the deposit check and what it means to accept it. The client should be reminded that the deposit should be held in escrow and that it is not supposed to be available to a seller until the closing.

Practice Note

Steer clear of appearing to advise the opposite party in the transaction. It is easy to get lured into providing legal advice to a seller who is representing himself or herself when you hear, "Can I just ask you a quick question?"

If your selling client later decides that a broker would be a better business choice, request a list of the people who have already viewed the property for purchase. This list should be referenced in the listing agreement with the broker with the understanding that a reduced commission will be paid on the sale to any party introduced to the property by the seller's own efforts.

Practice Note

If the selling client has not engaged a broker, the seller is responsible for obtaining the required final utility readings and smoke and carbon monoxide detector certificate. You should instruct your client to make these arrangements well in advance of the closing so that there is not a last-minute scramble to arrange for appointments with the municipal authorities. (It is rare for a seller to have the right number of detectors in the correct locations.) Encourage your client to utilize the services of the broker for assistance in these matters. See the Practice Notes above.

§ 1.4 THE MORTGAGE FINANCING CONTINGENCY CLAUSE

The well-prepared buyer, before beginning the journey leading to an offer, has obtained information regarding the price range of his or her proposed purchase as well as the mortgage amount that the buyer can obtain. Many sophisticated buyers have already arranged for preliminary mortgage financing, commonly referred to as mortgage preapproval or prequalification. How much the buyer can borrow establishes his or her price range for buying a new home. Additionally, most brokers advise their seller clients to not entertain offers without a preapproval letter to establish financial qualifications of the offeror (buyer).

Practice Note

Be sure to counsel the buyer that this preapproval letter is not a commitment but merely an indication that a loan of the specified amount might be made if all investigations prove favorable.

Most often, a buyer applies for traditional financing through a mortgage broker or bank representative, although some buyers obtain financing through the Internet, from the seller, or from other private financing sources. Both the offer and the purchase and sale agreement typically contain a mortgage contingency clause, which states the date by which the buyer must apply for mortgage financing and the date by which the seller or the seller's representative must be notified that the buyer wishes to terminate the agreement due to the inability to secure mortgage financing. The particular terms of this contingency, such as what constitutes a commitment for financing, should be negotiated as part of the purchase and sale agreement.

Practice Note

Buyers should consult with their lender prior to establishing a timeframe for financing. Once the financing contingency date has been established, it is extremely important that both you and your buyer client keep close track of the contingency deadline. If the date goes by and the buyer is unable to secure mortgage financing, he or she is obligated to proceed with the transaction or risk losing the deposit as liquidated damages.

Practice Note

Be sure to advise your seller clients about the ramifications of the mortgage contingency clause. Your client may not have the sophistication to understand that the deposit may have to be returned if the buyer cannot obtain financing within the time set forth in the clause. Be sure to point out the options to the seller if the buyer requests an extension or desires to withdraw from the agreement. Seller's counsel might consider a requirement in the contingency clause that the buyer is required to produce a letter of rejection.

Because of today's hot market in the greater Boston area, many cautious buyers lose out on the home of their choice because their offers contain contingencies for mortgage financing and for home inspections. As a consequence, many current buyers "throw caution to the winds" and waive home inspections and mortgage contingencies with the hope of making an offer more attractive to a seller. Some buyers who have private financing or are buying for cash delete the financing contingency clause from the agreement. Be sure to point out to your buyer client the risks involved if the expected financing does not materialize and there is no mortgage contingency clause in the purchase and sale agreement. This advice should be given in writing to the client by letter or email so that it is memorialized in case the buyer loses his or her deposit because financing did not materialize or a situation occurs where the sale takes place and major deficiencies are discovered.

If the financing date has arrived and a commitment has not yet been obtained, buyer's counsel should request an extension of the contingency date in either the offer or the purchase and sale agreement to allow the lender more time to issue a commitment letter or to meet certain conditions that are under the lender's control, such as obtaining mortgage insurance or additional appraisal data, while still protecting the buyer's interests. Alternatively, if it is clear that the buyer cannot obtain the necessary financing, a notice to that effect should be prepared and delivered to the seller by the method required in the offer or the purchase and sale agreement. If no method is identified, then recommend to your client that certified mail notices be mailed to the seller with copies hand delivered to the listing broker and the attorney representing the seller.

The buyer may seek your advice as to which mortgage lender or officer he or she should apply to and may seek similar referrals from the broker who introduced the property. If you are asked for a referral, give your client a number of names to choose from so that he or she can decide on one. It is the buyer's responsibility to choose the professional with whom to do business. If you discount your fee for representing both the lender and the buyer, and you give the buyer names of lenders whom you represent, you should disclose this to your client. See § 1.7, below, for a discussion of ethical considerations for counsel.

§ 1.5 OTHER PARTIES INVOLVED IN THE TRANSACTION

There are other parties with whom the buyer client may come into contact during the purchase and financing process, such as a home inspector, who provides the buyer with a report of the physical condition of the property and is typically engaged prior to the signing of the purchase and sale agreement. If you provide your client with the names of professional home inspectors, it is important to explain that you are not making any representations as to the quality of the inspectors' work and are signifying only that you know of them or that the inspectors have represented one or more of your clients in the past.

Other professionals who are involved in the property transaction, but with whom the buyer may not come into direct contact, include the following:

- the appraiser hired by the lender,
- the credit reporting agency,
- the municipal building inspector,
- the surveyor who will prepare a plot plan for the lender's attorney,
- the title examiner hired by the lender's attorney, and
- the tax collector for the town where the property is located.

Finally, lender's counsel will usually contact the seller to inform him or her of the closing requirements, such as payoff letters, etc. This first contact is permitted, but you should be copied on all correspondence from lender's counsel. When acting as counsel to the buyer or the seller, if you know that the opposite party has an attorney, you cannot contact the party directly without the express permission of that attorney. If you have a question that would be best answered by the actual owner, go through the broker.

§ 1.6 ADDITIONAL PROBLEMS TO RESOLVE PRIOR TO CLOSING

If you are representing a seller, the lender's counsel will look to you to obtain certain information from your client, such as account numbers and servicer information for outstanding mortgages. Be sure to obtain this information from your client early on in the process. A delay in providing current mortgage information to the lender's attorney may result in a delay in the closing. You may also be asked to provide the seller's taxpayer ID number and forwarding address to complete the information to be provided to the IRS under Form 1099 reporting requirements. Be sure to use secure transmissions when providing sensitive information to parties or counsel.

The settlement agent for a property transfer (typically the lender's attorney) is required to submit 1099S forms to the IRS each year for each transfer of real estate. In addition, the lender's attorney will look to the seller's attorney to resolve any problems

that come to light as a result of the plot plan tape survey, the municipal lien certificate, or the title examination.

If a problem cannot be resolved in time for the closing to take place by the date set out in the purchase and sale agreement, it is the responsibility of the seller's attorney to give notice to the buyer and to the buyer's attorney under the appropriate provisions of the purchase and sale agreement. Ordering loan payoffs has become more complicated. In many instances, particularly for equity lines, the seller must sign a request for payoff and a termination of the equity line.

Such problems may include the following:

- back taxes or other municipal charges showing as “due” when the seller has in fact paid these bills,
- property that does not conform with zoning requirements or additions built without a permit,
- improvements on the real estate that encroach into easement areas,
- undischarged , but presumably paid, mortgages of the current or prior owners,
- improperly probated estates in the chain of title, and
- other problems in the chain of title or matters of record that adversely affect title to or use and enjoyment of the property.

It is essential for you to immediately address any problems that are brought to your attention. Some problems can be resolved by a simple telephone call, but others will require a great deal of research and time to resolve. Remember that in any real estate agreement, time is of the essence. If a problem will take a great deal of time to resolve and this contingency was not addressed in your original fee agreement with the seller, you should address it as soon as it arises. A new fee agreement may be required to deal with unexpected or unanticipated issues.

The lender's attorney may offer to resolve a title problem for the seller. However, such an offer will undoubtedly create an additional fee to your client. If this offer seems reasonable to you and you believe that the lender's attorney will be able to handle the matter more efficiently and at less cost to your client than you could—perhaps due to the attorney's expertise in handling such matters or as a result of his or her ability to access information such as which agency is handling the affairs of a failed bank that has an undischarged lien on the property—explain this to your client. However, remember that the lender's attorney's primary responsibility is to make sure that the mortgage documents are correct and to secure a valid first lien position. The lender's attorney is not necessarily concerned with matters that are between the buyer and the seller and do not affect the lender's interest in the property, such as whether fuel oil adjustments have been properly calculated or whether the property was left in “broom clean” condition.

Practice Note

Should lender's counsel attempt to cure the problem? Lender's counsel should be aware of several likely problems when he or she undertakes to cure a title problem. For one, there may be a sense that lender's counsel has found a problem for which he or she will be then paid to cure. What if the problem takes longer to cure than anticipated, so much longer, in fact, that the problem will not be cured by the closing date? Has the lender's attorney placed himself or herself in the untenable position of guaranteeing a cure *before* closing? Lender's counsel should make clear what the effort will entail, the approximate cost, and the amount of time necessary to find a solution.

Practice Note

Caution: Is the attorney for the lender also the attorney for the buyer? In such instances, it is not advisable to accept his or her offer to resolve title problems for the seller.

If the buyer is not financing the purchase, the buyer's attorney will be responsible for certain tasks that are usually performed by the lender's attorney. These include the following:

- obtaining a title examination, a plot plan, and a municipal lien certificate;
- ensuring that title to the property is clear and marketable;
- making sure that the property conforms to zoning requirements; and
- confirming that all back municipal charges are paid to date and that any current charges are properly accounted for at the closing.

In this case, the buyer's attorney should also obtain payoff figures for the seller's current mortgages and any other liens of record to be paid at the closing and should act as the settlement agent, making the appropriate payments and recording the deed, vesting title in the client at the registry of deeds.

The buyer's attorney and the seller's attorney are responsible for reviewing the seller's closing disclosure and the buyer's closing disclosure to ensure that all variable closing costs are reasonable and accurate, and for explaining these costs to their respective clients. (These forms replaced the HUD-1 or RESPA statement. See the Practice Note below on TRID.) The settlement statement will be provided by the lender's attorney's office. If there is no lender's attorney, the attorney who is acting as settlement agent will prepare the statement.

Practice Note

The Consumer Financial Protection Bureau (CFPB) integrated the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act. The acronym for the new law, which came into effect on October 3, 2015, is TRID. New disclosures are required as well as the necessity for new forms. But it is important that the attorney for either the buyer or seller know and understand that there are critical deadlines as to when

loan estimates and closing disclosures must be delivered to the buyer-borrower. If deadlines are not met, closings can be delayed for up to seven days. Attorneys representing buyers need to add specific language in the purchase and sale agreement to accommodate the deadlines and to point out that delays might be incurred through no fault of the buyer. Attorneys representing sellers must apprise the seller-client that an unanticipated delay may affect the closing date. If the seller is in the process of purchasing a new home, care must be taken in drafting the seller's purchase agreement, since a delay in the seller's sale may put

the seller at risk of losing his or her deposit on the purchase of his or her new home.

Practice Note

Consider that the timeline to complete a transaction is likely to be closer to sixty days than it is to thirty or even forty-five days.

§ 1.7 ETHICAL CONSIDERATIONS FOR COUNSEL

You may be asked to represent more than one party in the transaction. Representing both the buyer and the seller presents a clear conflict of interest and should not be pursued. Likewise, the same attorney should not represent both the seller and the lender. Representing both the buyer and the lender presents fewer conflict-of-interest issues because both parties share the common goal of vesting good title in the buyer and securing a first lien position for the lender, and neither the buyer nor the lender will want a closing to take place unless:

- there is clear and marketable title;
- the property complies with applicable zoning requirements;
- all municipal charges that could become a lien on the property have been paid;
- all requirements peculiar to the particular kind of property being conveyed have been met, such as having a certificate of occupancy for new construction; and
- deed stamps are in compliance with G.L. c. 64D, § 7 and REBA Ethical Standard No. 1.

A conflict will arise, however, if there is a dispute between your buyer client and your lender client regarding the mortgage process. In this case, you should recommend that both the lender and the buyer be represented by their own counsel. Common sense dictates that you should withdraw as counsel for *both* clients.

§ 1.8 ORGANIZING YOUR PRACTICE

In order to better serve your clients, whether they are buyers, sellers, or lenders, you and your staff should have various methods in place to keep track of the status of each file and important dates involved in each transaction. If you are organized in this way, you will be well prepared and able to intelligently discuss any transaction when you receive a phone call or correspondence regarding it. Also, you will not jeopardize your client's interests by missing an important date, such as a mortgage contingency date, or by not realizing that you have not received a plot plan that was ordered for a pending closing.

Tracking and organization can be accomplished by using a calendar, a monthly planner, or an equivalent software program. No system will work well for you, however,

if you do not make it a habit to check it each day and follow up on what you see. The best reminder may come from your clients themselves. Encourage them to keep track of important dates and to call you with progress reports. If you are representing lenders, be sure that you are familiar with each lender's particular scheduling requirements so that you will be able to schedule a closing in accordance with their lead time specifications.

Practice Note

Train your staff to take very detailed messages from clients and others regarding any real estate transaction in which you are involved. These messages should include not only the caller's name and phone number, but the name of the client involved, the property's address, and the nature of the call. With this information, you can have the relevant file in front of you when you return the call, and perhaps even have the information available to answer the caller's question right away. Since it is more likely that you will be receiving emails, not phone calls, have a sub-folder set up for each client so that you can easily find messages in your in-box.

Although all questions regarding the negotiation of the purchase and sale agreement and questions of law will be directed to you, a well-trained paralegal can handle some calls regarding questions of fact. Delegating these questions can result in more-efficient use of your time. If some questions will be addressed by your paralegal, be sure to give his or her name to your clients so that they will be comfortable speaking with the paralegal if you are not available or if the inquiry is one that the client thinks the paralegal can handle. Your time can also be used more efficiently if you develop forms, templates, or form-type letters to be used in your real estate practice.

§ 1.9 TITLE INSURANCE

In many cases, especially if you are also representing the lender, your buyer client may ask you about the issuance of title insurance. Be sure to advise your client of the advantages and disadvantages of an owner's policy and also the fact that you will receive a commission from the title insurance company for your services as an agent of the title insurance company. The disclosure should be the subject of an early written explanation.

If you are not representing the lender, your buyer client may seek your advice about whether to purchase an owner's policy of title insurance. Although there are advantages and disadvantages in the acquisition of title insurance by a buyer, be extremely careful in providing advice to the uninformed buyer. Suppose you advise the client that a savings of several hundred dollars could be achieved by not acquiring an owner's policy of title insurance. Then, sometime later, a title defect is found for which the lender's attorney might have no legal responsibility. Will your client seek resolution of the title defect from you because of your advice? Be sure to provide the best advice available under the circumstances, but leave the ultimate decision up to the client.

Practice Note

Many title insurance companies offer “enhanced” or “upgraded” title insurance policies for lenders and owners. There may be an additional fee for an upgraded policy. Be careful to advise your buyer client of the additional cost for such policies and the coverage benefits. It may be a malpractice issue if you were careful enough to advise a client to purchase a title insurance policy but failed to advise the client what the additional premium would be for the upgraded policy. Now visualize the title problem for which there is no coverage under the basic policy but coverage would have been available if the client had been advised that an upgraded policy could have been purchased for a few extra dollars. The client’s argument, of course, would be that he or she would surely have purchased the upgraded policy if only you had advised that one was available. The next steps are inevitable.

§ 1.10 CLIENTS WHO ARE BUYING AND SELLING ON THE SAME DAY

Many clients will come to you asking that a closing for a purchase and a sale take place on the same day. At one time in the conveyancing practice, multiple transactions with the same client on the same day were accomplished with relative ease. Many buyers and sellers (or buyers who are also sellers or sellers who are also buyers), as well as many brokers, still consider such transactions routine. Unfortunately, with the requirement of “good funds,” the advent of the secondary mortgage market, the increasing use of out-of-state lenders, and TRID requirements, the process of selling and buying on the same day requires considerable planning, and, unfortunately, a good deal of luck. Be extremely clear with your client regarding the dangers of attempting to arrange two transactions on the same day. Typical “what-ifs” are the following:

- What if there is a TRID delay? What if the wired funds do not reach the lender’s attorney’s account before the scheduled closing?
- What if the buyer (whether it is your client or not) has a change of circumstance that requires the lender to withdraw the commitment?
- What if there is a title issue with one of the properties that makes a postponement necessary?
- What if the lender does not approve the closing disclosures from the sale and/or the purchase?
- What if the seller of one of the properties cannot move out on time?
- What if the buyer of one of the properties is unable to obtain a mortgage commitment, requiring withdrawal from the purchase?

- What if there is a casualty loss or damage to one of the properties before closing?
- What if the registry of deeds is unable to record the first transaction before the end of the day?
- What if your client can sell but cannot purchase?
- What if your client can purchase but cannot sell?

The foregoing “what ifs” represent only a few of the many issues that may arise; they require considerable coordination and thought to overcome. Of course, you may or may not be able to intervene and solve these matters if they do occur, but you should take time and care at the outset of the proposed transactions to explain to your client the potential problems that may arise. Counsel your client to consider alternative options such as bridge financing or financing from relatives, temporary housing, and overnight storage should a problem occur that would require a delay in one or both transactions.

One of the major issues to consider relates to protection of the deposit. Your client's deposit may be at risk if the purchase is forestalled by an inability to sell his or her present home. You might be able to negotiate a contingency requiring the sale of the present residence as a condition to the purchase of the client's new residence. However, such conditions are rarely looked on with favor by the attorney for the seller because the condition shifts risk from the buyer to the seller.

Practice Note

The Real Estate Bar Association for Massachusetts (REBA) is an excellent resource for title standards, forms, and ethical standards. Every attorney representing a buyer, seller, or lender should be aware of and acquainted with the quantity of helpful information which is available through this bar association.

MCLE and the author thank Craig P. Gilmartin, Esq., and Suzanne A. Stark, Esq. for their previous contributions to this chapter.

ü Checklist 1.1

Purchase and Sale Conference Checklist for Representing Seller

This checklist was originally prepared by Francis T. Reynolds, Esq. Paragraph references correspond to the standard form purchase and sale agreement of the Greater Boston Real Estate Board.

- Confirm ownership, location of property, whether property is registered or unregistered and if registered, whether prior approval of deed by Land Court will be required.
- Confirm price—and determine what is to be included in and excluded from the sale. Be sure to make reference to inclusions and exclusions in the agreement.
- Determine if there were any takings, encumbrances and/or betterments.
- Are there any matters requiring disclosures—underground tanks, septic system, chlordane, lead paint, wet basement, urea formaldehyde, asbestos, tiles, shingles, pipes, mold, etc.? (Try to use hold harmless and indemnification language relative to all of these matters.)
- Determine the deposit amount and explain to your client that the retention of this deposit amount would be the seller's liquidated damages in the event of the buyer's default.
- Determine whether there is any personal property being conveyed along with the real estate.
- Are there any express warranties? If so, advise seller of consequences.
- Determine the amount of the commission (and any realtor referral fee), when such commission or fee is due and whether or not there is a prior existing contract with the broker governing when commission is payable.
- Agree on closing date and extensions and discuss problems relating to any expiration of a financing commitment.
- Be sure to provide clients with an initial contact letter detailing services and fees.
- Are there any clauses to survive the agreement? If so, advise clients of consequences.
- Advise seller as to necessity of complying with smoke detector and carbon monoxide law.
- Discuss using language that would prohibit buyer from presenting checks that are not payable directly to seller without endorsement—attempt to convince

brokers to do likewise. Also add language to Paragraph 7 requiring that checks be drawn on a Boston clearing house bank. Determine if the seller will want wired funds from the closing. If so, include in Paragraph 7.

- In the case of an assumption of mortgage, be sure to modify Paragraphs 4 and 7 of the GBREB agreement and insert a provision dealing with the buyer assuming the obligation and agreeing to pay it. Be sure to advise the clients of the dangers of a buyer assuming the clients' loan obligation.
- Discuss fences, size of all structures, size of the lot, zoning and any possible encroachments onto or from the premises.
- Discuss the distribution of interest on the deposit with seller.
- Explain that Paragraph 18 requires a dividing of the benefit of an elderly or veterans abatement if seller falls into either one of those categories unless the agreement is amended.
- Advise seller to cancel insurance after the closing and recording of the deed and attempt to obtain a refund with regard to any premiums.
- Inform client about procedures that can be utilized for a bridge loan, if necessary.
- Ask clients to consult with their tax advisors for advice on possible tax consequences with regard to the sale.
- Ensure that seller understands that the premises are to be vacated and totally free of personal property by the time of closing or the buyer's scheduled walk-through.
- If the premises are a condominium unit, determine if there is any right of first refusal that must be waived and review notice procedures in master deed.
- If the premises are a condominium unit, seller will be required to obtain a certificate of insurance from the trustees of the condominium.
- Amend broker clause by adding language to the effect that broker receives commission only if and when title passes and that the existence of any inability on seller's part to close arising from title defects or other defects with the property shall not be a circumstance under which the broker would be entitled to a commission.
- If the premises are a condominium unit, seller will have to obtain a 6(d) certificate and waiver of right of first refusal from the trustees of the condominium, if required. A contingency should probably be inserted into the agreement stating that seller's obligations to sell are subject to being able to obtain any waiver of an existing right of first refusal.

- If there are any local condominium by laws or ordinances, language should be inserted relative to the agreement being subject to the obtaining of a removal permit (e.g., Somerville).
- Obtain and check current Title Policy Schedule B and include any exceptions into P&S.
- Be sure seller is not a foreign national, and if so, advise seller as to necessity for withholding a certain portion of the proceeds due to the Foreign Investment and Real Property Tax Act.
- If seller does not reside on the property, there could be a requirement for Chapter 93A disclosures.
- Discuss the 10-day inspection period relative to lead paint.
- Seller's lending institution should be identified, and seller should be advised to either confirm the payoff or obtain authorization to do that on seller's behalf. Obtain social security number(s), lender, address, contact telephone and account number of all loans.
- Ask if there are any tenants. If so, review leases, if any. Seller should be sure to resolve any issues regarding transfer of security deposits and last month's rent, or providing the buyer with a credit for the security deposit or rent proration if the tenants will be remaining at the property after closing.
- On financing consider a provision that buyer's failure to obtain financing due to a failure to sell buyer's own home shall not excuse buyer from performance.
- If premises are a condominium unit, be sure to determine whether there are any pending or possible special assessments.
- Obtain a copy of seller's deed to review in advance.
- If seller is an estate, be sure to use special language regarding obtaining the best price and be sure to prepare a fiduciary deed.
- If seller is an estate, determine if a license to sell will be required, If so, insert a contingency in the agreement relative to the necessity of obtaining such a license.
- Discuss with seller the benefit (although hardly ever accomplished) of seller's performing a title examination prior to signing a purchase and sale agreement to be sure there are not any title defects that could delay or prevent the sale.
- Ask seller for a copy of existing title insurance policy, if any, so that we can include matters from Schedule B into the P&S agreement.

- Are there any woodstoves or fireplace inserts requiring permits? If so, determine if permits have been issued. If not, advise clients of possible code violations and necessity to obtain such permits.
- If the property is registered land and an estate is selling, advise parties that Land Court approval will be required.
- If property is in Worcester County, the practice is that seller pays for title costs—be sure that the agreement is clear. This practice is negotiable; it includes Worcester and the towns that actually abut.
- Check for any asbestos siding, asbestos flooring or asbestos pipe insulation.
- Ask if there have been any additions or accretions to the property since its original configuration. If so, were proper permits obtained?
- Ask if seller wishes to include a clause entitling seller to attorney's fees if there is any litigation relative to the agreement.
- If the property is in Newton, a use and occupancy certificate may be required.
- Be sure that there are no tax abatements (since they are personal and may be the property of seller, so that buyer would not be entitled to benefit from them). (Note there are other abatements relating to the property that would benefit buyer.)
- Consider adding language stating seller shall not have to sign any documents at closing with regard to lead paint that contravene the provisions of our standard lead paint clause.
- Consider income in respect of a decedent if it is likely that one or more sellers may die before closing. If this is a possibility, the purchase and sale agreement may have to be prepared in such a way that seller and his or her heirs and personal representatives are released from all obligations in the event of seller's death. The income in respect of a decedent issue is troublesome because it can result in the selling entity having the proceeds taxed as income (capital gain). This may be a difficult issue to negotiate with buyer's counsel since buyer may not be willing to make the necessary commitments if there is a significant risk of the purchase and sale agreement being dissolved.
- Determine who holds seller's mortgage. Will there be any problems obtaining a payoff or a discharge? If it is a private mortgagee, instruct seller to initiate efforts to obtain the discharge prior to closing so it may be held in escrow and ready for buyer's lender's attorney.
- Consider deleting the lead paint paragraph from the standard preprinted agreement if an optional lead paint provision is utilized in the additional provisions; at some point in the agreement include language to the effect that seller is under no obligation to remove lead in any form prior to or after closing and that buyer agrees to hold seller harmless from any and all consequences of the presence of

lead in any form for causes of action that accrue subsequent to the time of buyer's purchase of the premises.

- Add a paragraph to the agreement indicating that buyer has either consulted an attorney relative to the purchase and sale agreement or has waived the opportunity to do so.
- Consider adding to the paragraph dealing with buyer's inspections language holding seller harmless and indemnified from any and all causes of action, including attorney's fees, arising from matters disclosed in the purchase and sale agreement, revealed by buyer's home inspection, or known to buyer prior to the delivery of the deed.
- Be sure that all of buyer's agreements survive delivery of the deed.
- Discuss the consequences of a death of one or both sellers. In addition to issues involving income in respect of the decedent, discussed above, seller may wish to avoid the agreement in the event of death and if that is the case a particular provision will be necessary.
- Discuss Title 5 compliance issues. (Note that Title 5 requires annual inspections for a condominium with a septic system.)
- Discuss the likelihood of a necessary post-closing tax adjustment.
- Has any asbestos been removed by nonprofessionals without proper permits and notices?
- If there has been any underground storage tank removal, use a covenant not to sue.
- Ensure that there are no incomplete estate tax or probate matters involving any deceased co-owners or former owners.
- Add "or any supplemental condominium assessments noted after the date of this agreement" to Paragraph 4c.
- Advise seller that Paragraph 9(b)'s reference to delivery of premises "not in violation of . . . building and zoning laws" could require corrective action at seller's expense. Consider adding that the provisions of Paragraph 9(b) "shall not impose any affirmative obligation upon SELLER to correct or remedy any of the matters which are the subject of said paragraph."
- For inspection clause (Paragraph 9), add that the premises are sold "as is," including all patent and latent defects and deficiencies, and without recourse to seller, and that seller shall have no obligations to buyer or with regard to the premises after delivery of the deed (see Paragraph 13).
- Strike "either the original or" from Paragraph 12.

- Provide buyer results of any lead paint inspection.
- Any Medicaid issues—any liens—any nursing home for present or prior owner?
- Confirm that all prior mortgages are discharged as of record.
- Tell seller to be sure to get original promissory note and mortgage from lender.
- If rental property, consider agreeing with buyer to conduct lead paint inspection after agreement is signed so that any notices to tenants regarding test results will follow a signed agreement.
- Ask seller if seller has considered converting multi-units to a condominium prior to sale (may bring higher price).
- Is there a seller's disclosure? If so, be sure to add limiting clause to agreement protecting seller from claims arising out of any errors made by the seller in completing the form.

ü Checklist 1.2

Buyer's Checklist for Purchase and Sale Agreement

This checklist was originally prepared by Francis T. Reynolds, Esq. Paragraph references correspond to the standard form purchase and sale agreement of the Greater Boston Real Estate Board.

CONFERENCE WITH BUYER OF REAL ESTATE

- Confirm location of property and whether title is registered or unregistered.
- Confirm price and deposit.
- Consider warranties that water and sewer are connected to municipal systems, determine if electric system is municipal.
- Discuss closing date and coordinate it with the expiration of the letter of commitment. Consider language regarding an extension if the lender cannot close by the closing date. Consider including provision for compensation for alternate living arrangements in the event of a seller required extension.
- Discuss whether there are any items of personal property being conveyed. If so, be sure to include all such items to be conveyed in the purchase and sale agreement.
- Determine how buyer wishes to acquire title: tenancy in common, joint tenancy or tenancy by the entirety.
- Discuss deposit amount and liquidated damages (these amounts may not be the same).
- Are there any express warranties? If so, be sure to include them in the purchase and sale agreement. Be sure to indicate that such express warranties survive the closing.
- Discuss the particulars of the financing contingency. Be sure to discuss the number of applications and specify whether the financing is fixed or variable rate. Explain to buyer that a cancellation of financing could result in a loss of the deposit. Apply for exact amount: do not say “or less” or “not to exceed.” If buyer is also selling a property, say “subject to sale of present premises” if buyer can't carry both.
- Discuss the lead paint law and the advisability of a lead paint inspection. Point out to buyer that banks may require buyers to sign agreements that they will de-lead the premises in the event that lead paint is discovered therein. If acquiring a rental property, be sure that the tenants have been given notices re statute.

- q Discuss systems, structures, and inspections, pointing out urea formaldehyde and the requirement of a separate termite inspection. Advise re zonolite insulation containing asbestos (material consists of bark-like pellets; may be yellow or gold).
- q Discuss wet basement language.
- q Be sure to give buyer a copy of initial contact letter explaining included services, fees and excluded services.
- q Determine if any clauses are to survive the agreement.
- q Add a statement to the agreement to the effect that seller is not aware of any past, pending or future litigation with regard to the premises.
- q Discuss title insurance and the advisability of obtaining it. Go over typical exceptions and reasons for buying title insurance at this point.
- q Discuss the effect of any betterments or assessments, and current taxes considering how premises are assessed and the mechanics of abatement. Amend purchase and sale agreement to state that seller has no knowledge of any pending betterments and/or betterment assessments.
- q If the client has engaged you for a zoning opinion, discuss zoning and standard lot sizes as far as inability to rebuild or expand the structure is concerned; emphasize the importance of a plot plan and comment on G.L. c. 40A, § 7 (zoning enforcement).
- q Determine if premises are located on a public way. If on a private way, determine right of access.
- q Refer to additional page covering assumption of mortgage situations which require changes in Paragraphs 4 and 7 and the insertion of a new paragraph addressing the assumption.
- q Discuss situations in which the bank attorney will not certify title to buyer. These are typically commercial, second mortgages and refinances.
- q Inquire as to whether or not there is anything peculiar about the arrangement of the lot lines, structures, fences, landscaping or the like. Make a particular request with regard to anything that would suggest that an easement may exist and add an affirmative statement to the effect that "SELLER has no knowledge of any easements other than as follows: _____."
- q Have buyer determine whether or not the premises are on a federal flood plain and advise buyer if that is the case, there could be some difficulty in selling the premises in the future if the federal government suspends the federal flood plain insurance program. Have buyer check at town hall for a flood zone classification, especially for a condominium, since the lender may not require a mortgage plot plan.

- Advise buyer as to recently discovered water pollution in certain municipalities and suggest that if there is any question the drinking water be tested analytically.
- Advise buyer as to the common practice regarding interest on any deposits.
- Advise buyer as to the nature of the smoke detector and carbon monoxide detector laws and be sure buyer understands that it may be necessary to sign an affidavit at closing relative to the presence of acceptable smoke and carbon monoxide detectors.
- If the transaction will not include a mortgage, order a municipal lien certificate immediately and also call title examiner to get the title exam under way and a surveyor for plot plan.
- Be sure to include the use and occupancy certificate requirement if the premises are to be new construction. Be sure that builder warranties are made part of the agreement.
- Advise buyer that power lines have been suggested as a source of cancer-causing radiation.
- Include a statement to the effect that seller would agree to sign documents with regard to lead paint reasonably required by buyer's lending institution.
- In some situations buyer should be advised that an additional provision could be inserted into the agreement to the effect that seller has disclosed all material defects of which he or she is aware, and acknowledges that buyer is relying on that representation as a basis for entering into the purchase and sale agreement. (It should be noted that this is very strong language, and it is likely to chill the relationship between buyer and seller. Perhaps it is best used in a situation where seller has insisted on a representation from buyer that buyer has inspected the premises and has found them to be conclusively presumed to be satisfactory in all respects with regard to the purchase and sale agreement.)
- Consider modifying the purchase and sale agreement with regard to building and zoning laws so that compliance does not occur by virtue of status as a legal non-conforming use or by variance or by special permit.
- If seller is a foreign national, a FIRPTA (Foreign Investment in Real Property Tax Act) affidavit may be required. Be sure that seller complies with all IRS requirements if seller is a nonresident alien.
- Advise buyer with regard to the possible presence of radon, asbestos, lead paint, mold and hazardous waste. Advise buyer to consult with home inspector regarding presence or absence of these and other hazardous or dangerous materials or gasses.
- Discuss commitment letter terms with buyer and be sure buyer understands that a deposit may have to be made and it might be advantageous to accelerate

the closing by paying the bank attorney in advance to start the title. Be sure buyer understands that closing date must be scheduled within the period of the commitment.

- Consider but don't necessarily use an additional provision stating that if either party breaches the agreement, the party prevailing in litigation shall be entitled to reimbursement for all costs and attorney's fees.
- Consider whether buyer wishes to invest in an instrument survey—explain the difference between an instrument survey and a tape survey.
- Consider a warranty in the agreement that all utilities are delivered through valid and enforceable appurtenant rights.
- Consider including a representation that seller has no knowledge of any violation of the state's sanitary or building codes with regard to the premises.
- Check files to see if a back title reference is available on the property being purchased.
- Obtain a representation from seller to the effect that to the best of seller's knowledge there have never been any underground storage tanks located on the premises.
- If the premises utilize a septic system, suggest to buyer that the town be contacted to determine whether proper permits have been issued. Be sure no so-called gray water is being discharged into a non-approved system. Consider feasibility and cost of replacing system. Would system have to be relocated? Consider a private inspection to verify condition. Have inspector confirm insurance for errors. Would expansion of the house require additional capacity, and is that feasible?
- Ask buyer to attempt to obtain a seller's disclosure from the real estate broker and incorporate it by reference in the agreement.
- If buyer is also selling premises, in addition to discussing bridge loans, be sure to point out the difficulties that could result if a title defect is discovered with regard to buyer's present home and at least mention to buyer that (although this is hardly ever done) a buyer's title examination could be conducted in order to anticipate and cure any potential title difficulties. Discuss necessity for buyer to consider worst-case scenarios: What if buyer can't sell present home? What if seller is unable to complete sale to buyer?
- Inquire as to whether there are any woodstoves or fireplace inserts; if so, permits may be required from the municipality. Advise buyer to check with the community or to have the home inspector check for permits.
- Be sure to amend the purchase and sale agreement in Paragraphs 7 and 13 relative to recording of deed.

- If transaction is to be recorded in Worcester County, be aware of the fact that practice in Worcester is to the effect that seller pays title costs; the purchase and sale agreement should make that clear. Seller's obligation is limited to Worcester itself and the communities that abut it.
- Be sure to inquire as to whether there are any tenants; if so, be sure to describe whether or not they are to stay in the premises or whether they must be removed prior to closing. Advise buyer of the implications of a tenant remaining as a tenant after closing. Inspect leases, if any. Determine the rent, security deposit paid and/or last month's rent paid. Consider a tenant estoppel letter to protect buyer.
- Sprinklers are generally required in buildings taller than seventy feet. *See G.L. c. 148, §§ 26A, 26A½; 530 C.M.R. § 2; Brook House Condo. Trust v. Auto. Sprinkler Appeals Bd.*, 414 Mass. 303 (1993) (discussing exemption for certain pre-1975 buildings converted to condominiums).
- If the property is a condominium be sure to use buyer's condominium checklist.
- Consider adding language to the financing contingency paragraph to the effect that the commitment must be free of contingencies that are beyond buyer's reasonable ability to satisfy and that only one application need be made by buyer in order to constitute due diligence.
- If the property being acquired involves a new home, be sure to include warranties and guaranties relative to performance of the heating and air conditioning systems, watertight basements, watertight roof, etc.
- Consider an additional paragraph to the effect that nonperformance of contingencies by seller will entitle buyer to a return of deposit or specific performance. (A Massachusetts case indicated that seller's inability to construct a deck was not sufficient to obligate seller to specific performance and only reasonable efforts were required.)
- Inquire as to existence of any appurtenant rights such as common areas; also consider assessments for any such areas. Check on rights and obligations of use of common areas and easements.
- Advise buyer to examine abutting zoning or offer a zoning opinion as a separate engagement.
- Does buyer desire to have a homestead? If so, plan to prepare and record a homestead declaration at the time of closing and collect the \$35.00 filing fee.
- Add a statement in the purchase and sale agreement to the effect that seller has no knowledge of any additions or accretions to the property since seller's purchase.
- Is there any asbestos siding, asbestos tiling, or asbestos-coated pipes? Has any been removed?

- Obtain representations from seller to the effect that no work on the premises that would require the approval of any governmental regulatory authority has taken place and that seller agrees to indemnify buyer from any and all consequences of any violation of this representation, which representation shall survive delivery of the deed.
- If the home is new construction, instruct buyer to confer with municipal officials to determine whether there will be any water, sewer or electric connection fees. If so, discuss shifting those costs to seller in the purchase and sale agreement.
- If the property is in Newton, a use and occupancy certificate may be required.
- If the home is new construction, a clause should be added to the agreement concerning denial of funding due to an insufficient appraisal amount. The provision should state that buyer will be released from all obligations under the agreements if the appraisal is insufficient in amount to permit the loan required by the financing contingency. This provision could be used in all transactions, and in cash purchases can be a contingency.
- To Paragraph 9 add the following subparagraph (d): “in compliance with environmental laws, statutes, rules and regulations.”
- Advise buyer to attempt to find out who holds seller’s mortgage. If seller amends Paragraph 14 of the purchase and sale agreement add language indicating that after-acquired and recorded documents will be satisfactory only in the event that buyer’s lender’s attorney does not take exception to any such documents or lack thereof in the title certification and title insurance policy.
- The purchase and sale agreement should include a representation to the effect that seller has no knowledge of any asbestos and/or other materials of a hazardous or toxic nature.
- Discuss with buyers the effect of death, disability or unemployment and be sure that they understand that such occurrences will not entitle them to be relieved of their obligations under the purchase and sale agreement and that their deposit will be at risk. Many lenders will refuse to provide financing in the event of a negative change of circumstances. While it may be difficult to negotiate a release of buyers in the event of a buyer’s death, some sellers may be willing to agree to such a provision.
- Locate the property on a town map and take note of obvious issues, if any, such as ponds, which could indicate wetlands and flooding; railways, which could indicate title questions; or any other topographical peculiarities.
- Consider modifying Paragraph 4(e) to indicate that easements that would permit transportation of hazardous flammable or explosive substances on or beneath the premises would be inappropriate; also, delete “of record.”

- If the building is new construction or if the property consists of vacant land, discuss Chapter 21E and the procedure for conducting a site assessment.
- For an extension by the seller under Paragraph 10, consider shifting rent and other costs for any extension to seller.
- If seller is a fiduciary, probate court approval may be required for any changes or negotiations.
- If seller is a developer, and/or buyer's lot is not separately assessed, add a provision obligating seller to place next and necessary tax quarters' payments in escrow.
- If the property being purchased is one of the initial houses in a subdivision, or is one of the initial sales of a condominium unit advise buyer that if the remaining homes or units do not sell, or if the developer encounters financial difficulties, there could be an adverse effect on value, and later houses could be sold for less and construction could even be stopped, leaving buyer in a half-completed subdivision.
- Title 5 issues. Inspections must have been conducted by seller within nine (9) months prior to sale. A contingency should be added to the purchase and sale agreement referencing Title 5, 310 C.M.R. § 15.000 et seq.
- Consider adding the following provisions:
 - Seller's lender is _____, seller's loan number is _____ and the mortgage balance is approximately _____. Seller is not aware of any other mortgages or encumbrances.
 - A copy of Schedule B of seller's title insurance is attached hereto.
 - Seller represents that seller has no knowledge of the existence of facts or circumstances relative to third parties asserting claims to use or ownership of any portion of the premises.
 - Seller represents that the premises are not in a so-called "watershed overlay district." If this representation is erroneous, then buyer, at buyer's option, shall be entitled to the return of all deposits and excused from performance. (Buyer should be advised to check at town hall to determine whether or not there is a "watershed overlay" in existence.)
 - Seller warrants to the best of seller's knowledge that no asbestos or UST has been removed from the premises.
 - Imposition of a PMI (private mortgage insurance) requirement by a lender shall entitle buyer to return of deposit (> 90 percent).
- Buyer should be questioned as to any particular requirements or desires with regard to the premises such as filling or removing earth or building upon any

portion of the premises. Buyer should be warned as to limitations that are in place with regard to wetlands and areas subject to special environmental protection under state and municipal overlays and by-laws. Buyer should be instructed to confer with representatives of the conservation commission and the building department of the municipality, and to review relevant municipal maps and charts. Does buyer want a contingency for any specific project?

- Remind buyer that if taxes go up it is buyer's responsibility to accomplish a re-adjustment after the closing (see Paragraph 17).
- What utilities are actually servicing the premises? Have seller warrant municipal sewer service and no septic system now or in the past. For condominiums, Title 5 requires annual inspection of septic system.
- Advise buyer to confer with local historical commissions to determine if the building is listed on any registers or located in a district that could result in restrictions and/or required approvals if renovation or painting is desired.
- Are there any gas stations in the vicinity of the premises? Possible hazardous releases. Also, does a nearby commercial area act as a benefit or a detriment to the purchase price or a future sale?
- Ascertain whether buyer has walked the property, looking for indications of contamination, abutter's interests or activities on the property, underground tanks, drainage culverts or pipes, paths or roadways. Suggest to buyer that home inspector should undertake this task as well.
- If buyer is purchasing land only, consider using a contingency stating that the agreement is "subject to buyer executing a construction contract on or before [specified date] that is satisfactory to buyer in buyer's sole discretion."
- Consider adding the following provision: "Buyer's obligations are subject to the premises being serviced by gas, electric and water facilities that are delivered to the premises directly from the public way or by means of valid and enforceable perpetual easements. If the requirements of this paragraph are not met at or before the date set to close, then at buyer's option all deposits shall be refunded and this entire agreement shall be unenforceable thereafter."
- If the premises utilize a septic system that has been certified to be in compliance with Title 5, seek representation that all waste water from the premises is discharged into the septic system and not into a so-called gray water dispense pit or drywell.
- Have seller agree to obtain evidence of no fees owed for any common area or amenities or to any homeowners' association. Advise buyer if association must be formed and regarding added expense and uncertainty regarding its formation; also, if deeds do not contain requirements to pay common charges (*Popponeset Beach Ass'n v. Marchillo*, 39 Mass. App. Ct. 586 (1996)), the association's only

remedy is G.L. c. 84, §§ 12, 14. Ask seller to attach copy of special permit or planning covenant requiring a common area arrangement so terms can be reviewed.

- Have buyer determine that property is not close to gas stations or sites on the DEP list.
- If new construction, have seller agree to pay all hookup and connection fees and warrant services to be delivered.
- If all or any portion is rented, cover handling of last month's rent and security deposit.
- If the property abuts a railroad, buyer may need approval from the Commonwealth's Department of Transportation to get a building permit if land was previously owned by railroad. Add a contingency that if title shows railroad ownership, buyer can be released.
- If new construction, add language to Paragraph 9 regarding conformance with subdivision control laws.
- How many driveways? Some towns only permit one.
- Advise buyer that subdivision issues will not be examined unless instructed to do so. Advise client of additional fees for such an examination.
- Be sure there are no Medicaid planning issues regarding manner of holding title.
- Are there any improvements or additions that buyer wants to make now or in the future?
- Any rivers or streams within 100 or 200 feet of the premises? Consider the Rivers Protection Act.
- If a substantial rehab or conversion is involved, consider warranties and good and workmanlike standard.
- Have buyer check at local police station regarding sexual offender registration information.
- Check for historical districts and buildings to determine if premises fall within such a district and what the implications are for repairs, painting, modifications, etc.
- Advise buyer regarding due diligence on neighborhood characteristics and how they can change (parties, noise, etc.).
- Review Paragraph 15 to be sure that it does not mandate flood insurance.

If buyer is purchasing a condominium unit, be sure to use the condominium checklist. See **Checklist 1.3.**]

ü Checklist 1.3

Buyer's Condominium Checklist (Supplement to Buyer's Checklist for Purchase and Sale Agreement)

See Checklist 1.2 of this book for the Buyer's Checklist for Purchase and Sale Agreement.

This checklist was originally prepared by Francis T. Reynolds, Esq.

- On new conversions, discuss assessment as a condominium unit as compared to prior character.
- Utility costs. Discuss possible approaches to apportioning where common systems.
- Zoning and building violations—smoke detectors—consider sprinkler regulations for high rise buildings. Insure compliance with carbon monoxide laws.
- Advise client of the importance of budget review. Obtain two or three years of budgets to inspect for trends. In large condominium developments, suggest that the buyer should consult with a CPA for careful analysis.
- Note I.R.C. § 528 regarding common charges being characterized as income if association does not follow correct procedure.
- Coordination of insurance on the condominium and the unit (percent interest times coverage). Be sure to advise client that a unit owner can purchase a policy to protect improvements and property within the unit.
- Advise client to review rental restrictions in the condominium documents. What is the percentage of owner-occupied units?
- Title insurance—which company has a policy insuring the unit? Obtain a copy of the policy and review known exceptions found in Schedule B of the policy.
- Is the unit in a condominium which has a swimming pool? DEQE regulations and G.L. c. 21A, § 13 concerning lifeguards at swimming pools.
- Determine whether condominium documents permit the granting of exclusive easements for balconies, decks, parking, etc.
- Be careful with regard to the condominium capital reserve regarding assignment. Most agreements indicate that the percentage of the capital reserve attributed to the unit is incorporated as part of the purchase price.
- If the condominium is in Somerville, a removal permit may be required.
- Consider including representation in the purchase and sale agreement that there are no suits or claims pending or threatened against the condominium association

or trust, or pending special assessments or budget changes in excess of 10 percent of existing amounts.

- Determine whether or not the condominium has Fannie Mae or Freddie Mac approval.
- Advise buyer with regard to so-called “loss assessment option” with regard to the owner’s policy with a minimum limitation of \$50,000.00.
- Consider adding a contingency to the purchase and sale agreement stating that the agreement is subject to and contingent upon buyer’s lending institution being satisfied with the contents of the condominium documents.
- Advise buyer to become familiar with the rules and regulations of the condominium trust.
- Is there a right of first refusal? If so, make sure seller is responsible for obtaining a waiver of the right of first refusal.
- Advise buyer that the condominium documents should be reviewed in their entirety. Determine if the buyer wishes to have you review the documents. Advise client of costs for such a review.
- Are there any elevators in the complex? If so, are they properly certified and covered by insurance? If there are fire escapes, check to insure that the fire escapes have been inspected as required by law.
- Have seller describe all amenities given by limited or exclusive easement, such as a deck or parking space.
- Consider utilizing a representation to the effect that seller has no knowledge of any special assessments made or contemplated.
- Advise buyer to check with condominium association to determine percentage of unpaid common assessments.
- Advise buyer to give the condominium representation form (required by some lenders) to the trustees and make its completion to buyer’s satisfaction a condition of closing. Also have a contingency to the effect that buyer’s lender must be satisfied as to the project’s compliance with Fannie Mae or Freddie Mac and prepare a proxy form signed by seller authorizing buyer to speak to the trustees.
- There is a form known as a facilities and conditions report that the condominium may prepare as a matter of course if it has 50 or more units; a copy of that form should be requested.
- Buyer should be advised to visit the condominium and speak to several unit owners to determine current issues and degree of satisfaction with the condominium management.

- Buyer should be advised to review copies of minutes of meetings to determine the degree of cooperation and efficiency of the governing organization for the condominium. Buyer should pay particular attention to topics such as complaints, finances, politics and litigation.
- Buyer should be advised to check on handicap access to the facility and note that there is a possibility that if the condominium documents permit business use of any units, all of the provisions of the ADA could be triggered.
- The purchase and sale agreement should contain a proviso that all of buyer's obligations are subject to a satisfactory review of all of the condominium documents.
- It should be clear from a review of the condominium master deed that the common interest adds up to 100 percent. The title examiner should be instructed to be certain that parking spaces have been properly assigned and that there are no duplications.
- Be sure to get affirmative coverage from the title insurer if the condominium is a phased condominium.
- Be certain that the condominium was completed within any time limitations imposed by the condominium documents and any special permits or variances issued by the community.
- Fannie Mae approval by a Form 1028 is good for 3 years; this is important while the developer still owns units. Once the condominium has sold out, the process of spot approvals begins. Most lenders conduct a spot approval process and certification (which has to be made to Fannie Mae) all in-house.
- A condominium that has a septic system should be in the practice of having a certificate prepared each year so that owners will not face that expense each time a sale takes place.
- Advise buyer regarding title certification difficulties and requirement for 50-year search.
- Advise buyer that title abstract may not include an examination of the parking space unless an extra cost is paid.
- If purchase involves a small condominium and percentage interest of buyer's unit is less than 50 percent, check provisions on voting freeze-out; explain potential deadlock if percentage is 50 percent. Determine how disputes are resolved. Check arbitration provisions. Who pays expenses and fees? Are they shared? Can the winning party in arbitration claim fees and expenses?
- If the purchase will involve a new condominium, is there a tax agreement and escrow for real estate taxes?

- Discuss possible document amendments regarding rental restrictions.
- Compare current footprint to floor plans to be sure there has been no unauthorized expansion.

ü Checklist 1.4

Checklist of Typical Contents of Initial Letter to Seller Client

- q Welcome the client to your office as a client.
- q Inform client that you have received, reviewed and revised [or prepared] a purchase and sale agreement.
- q Inform client that he/she will receive copies of all correspondence and documents.
- q Discuss:
 - q Range of services
 - q Disclosures that may need to be made to buyers
 - q Procedures and negotiations after agreement is submitted to buyer's attorney
 - q Seller's obligations regarding dates and notices
 - q Financing date, closing date and possibility of extensions.
 - q Discuss circumstances which would require a return of deposit.
 - q Problems that can arise if buying as well as selling on same day
 - q Documents necessary, such as deed, smoke certificate, final water readings, oil adjustment, tax receipts, utilities and insurance
 - q Discuss signing of documents and options for attendance at closing: client goes alone, attorney and client go together, attorney goes alone with power of attorney—also discuss signing procedures and protocols during the pandemic
 - q Fees and expenses

ü Checklist 1.5

Checklist of Typical Contents of Initial Letter to Buyer Client

- q Welcome the client to your office as a client.
- q Inform client that you have received, reviewed and revised [or prepared] a purchase and sale agreement.
- q Inform client that he/she will receive copies of all correspondence and documents.
- q Discuss:
 - q Range of services
 - q Identify your duties versus bank attorney duties
 - q Possibility of performing bank attorney duties as well, but inform client of conflict issues
 - q Procedures and negotiations after agreement is submitted to attorney for buyer
 - q Buyer's obligations regarding dates and notices
 - q Financing date, closing date and possibility of extensions
 - q Problems that can arise if buying as well as selling on same day
 - q Provisions in agreement that may be important to bring to client's attention
 - q Difference between plot plan and survey
 - q Zoning and zoning opinions
 - q Home inspection and negotiations—also asbestos, lead paint, radon, underground storage tanks, mold
 - q Septic/sewer/well water
 - q Signing agreement—protocol/e-signings
 - q Options for attendance at closing: client goes alone, attorney and client go together, attorney goes alone with power of attorney—also discuss attendance procedures during the pandemic
 - q Requirement for cashier's checks or certified funds at closing
 - q Fees and expenses

Counseling Clients Through Buying & Selling a Home

Scott J. Clifford, Esq.

Thomas J. Flaherty, Esq.



**MCLE
2022**

The Offer

- Understanding the importance of the Offer to Purchase
 - Offers are binding, legally enforceable, if necessary terms are included (description of property, price to paid and when)
 - You should include any term you deem to be material to the transaction
 - Time is of the essence
 - Most offers state subject to execution of mutually agreeable Purchase and Sale Agreement ("P & S") – see *McCarthy v. Tobin*



What are some common Buyer Material Terms?

Financing Contingency

Home Inspection Contingency

Lead Paint Inspection

Satisfactory Appraisal

Home Sale Contingency

Multi- Family Contingency

- Estoppel Certificates
- Vacant

What are some common Seller Material Terms?



Suitable Housing



No Warranties, Caveat Emptor - "As Is"



MultiFamily - tenants

Seller's Market

- Bidding Over Asking Price
- Escalation Clauses
- Waiver of Contingencies – significance of these
 - Inspection
 - Financing/Mortgage (NO TRID protection)
 - Appraisal

Buyer's Market



PRICE REDUCTIONS



CLOSING COST
CREDITS



SALE OF EXISTING
HOUSE
CONTINGENCY



APPRAISAL
CONTINGENCY

Purchase and Sale Agreements

- What language/terms can be added to the Purchase and Sale Agreement?
- Ministerial Changes v. Material Changes – see *McCarthy v. Tobin*
- Financing Contingency – “firm, written commitment”
- Reviewing and Explaining Provisions of the P&S to your Client
 - Seller: Significance of any agreed upon representations and/or warranties – importance of “broom clean”
 - Buyers: Significance of any contingency dates and liquidated damage provisions within the P&S

Scope of Representation

Clearly explain to your client in writing what you will be doing for them as part of your representation and your fee.

Conflicts of Interest: what parties can you represent in the same transaction?

Timeline of a Closing



OFFER



HOME INSPECTION



PURCHASE AND
SALE AGREEMENT



FINANCING
CONTINGENCY



BUYER COMPLETING
LENDER
REQUIREMENTS



BUYER OBTAINING
HOMEOWNER
INSURANCE

Timeline of a Closing Seller Obligations

Smoke /Carbon Monoxide Certificate

Title V Certificate

Final Readings for Utilities

Municipal Electric/Gas

Timeline of a Closing: Drafting of Documents



Deed – who needs to sign



Use and Occupancy Agreement



Power of Attorney



Homestead

Problems!

Buyer Defaults

Seller Defaults

Title Problem!!

Seller doesn't move out

Damage to Property

SOLUTIONS



REBA TITLE, ETHIC
AND PRACTICE
STANDARDS



USE AND
OCCUPANCY
AGREEMENTS



DEFAULT CLAUSES



TITLE INSURANCE
COMPANY

Wire Fraud and Fund Diversion

Fraudsters target all parties in
a transaction

Important to tell your client to
never wire money to any party
without calling a known
number to verify instructions
and to verify with you.

Beware of Fraudulent Payoffs

Fraudsters are very clever

NEVER WIRE WITHOUT
CALLING A KNOWN PHONE
NUMBER TO VERIFY - THIS
INCLUDES THE PAYOFF
LENDER AND ALL PARTIES

YOU WILL NOT HAVE
COVERAGE FOR A WIRE
FRAUD (EVEN IF YOU HAVE
CYBER COVERAGE) IF YOU
DO NOT CALL TO VERIFY
THE WIRE INSTRUCTIONS!!!!